

CITIZENS FOR GLENWOOD CANYON

IBLA 81-647

Decided June 15, 1982

Appeal from decision of the Colorado State Office, Bureau of Land Management, denying protest of the issuance of a right-of-way for Federal-aid highway, C-29107.

Affirmed.

1. Appeals -- Federal Land Policy and Management Act of 1976:
Rights-of-Way -- Rights-of-Way: Federal Highway Act -- Rules of
Practice: Appeals: Effect of

The effect of decisions of Bureau of Land Management officials regarding applications for use of the public land and its resources are stayed pending the time during which a party adversely affected thereby may file an appeal and during the pendency of any appeal properly filed except where statute or regulation provides otherwise. 43 CFR 4.21(a). Although the regulations governing issuance of rights-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), provide that such decisions shall be effective when issued, rights-of-way for Federal aid highways are expressly excluded from the scope of such regulation and thus, a decision to issue the latter type of right-of-way is stayed pending appeal.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way --
National Environmental Policy Act of 1969: Environmental Statements
-- Rights-of-Way: Generally -- Rights-of-Way: Federal Highway Act

Analysis of the environmental impact of the design of a segment of a proposed

highway crossing public domain land does not constitute an improper narrowing of the scope of the project for purposes of environmental review where the route of the entire project has already been determined after completion of an environmental impact statement, the portion of the highway across land administered by the Bureau of Land Management has logical termini and a substantial independent utility regardless of whether the balance of the project is constructed, and construction of the highway on BLM land does not foreclose significant alternatives with respect to the balance of the highway project.

3. National Environmental Policy Act of 1969: Environmental Statements

A finding that a proposed action will not have a significant impact on the environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that a hard look has been taken at environmental problems, that relevant areas of environmental concern have been identified, and the determination is the reasonable result of the environmental analysis.

APPEARANCES: Paul D. Phillips, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., and Marla Mansfield, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Richard O. Jones, Esq., Regional Counsel, Federal Highway Administration; Malcolm M. Murray, Esq., and Vicki J. Fowler, Esq., Assistant Attorneys General, for Colorado Department of Highways.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by the Colorado Lawyer's Committee on behalf of Citizens For Glenwood Canyon Scenic Corridor and others, from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 20, 1981, dismissing appellant's protest of the issuance of a right-of-way for an interstate highway across land administered by BLM in Glenwood Canyon, Colorado. Simultaneously with the decision denying the protest, BLM issued the right-of-way (C-29107) for the highway to the Colorado Department of Highways (CDOH).

The essential elements of appellant's protest were twofold. Appellant contended that BLM erred in its conclusion reached in the environmental assessment (EA) on which the right-of-way grant was based that construction

of the road across BLM land would involve no significant impact on the environment and that, hence, an environmental impact statement (EIS) was not required. It was asserted that the scope of the EA was improperly narrowed to address only the impacts of the short segment over BLM land instead of the entire 12.7-mile project and that the indirect and cumulative impacts of the entire project must be considered. Appellant's second contention in the protest was that BLM was precluded from relying upon the 1972 EIS prepared for the project by CDOH because that EIS was inadequate and because changed circumstances required a supplemental EIS. Alleged inadequacies in the EIS included the failure to consider alternative designs for the highway construction as well as alternative routes and inadequate discussion of environmental impacts resulting from construction and mitigating measures. Further, appellant contended that changed circumstances since preparation of the EIS, including statutory authorization for deviation from interstate highway standards, declining traffic demand, and the likelihood of insufficient funds to complete the project as planned, necessitate development of a supplemental EIS.

The BLM decision dismissing appellant's protest denied that the scope of the EA was improperly narrowed. The decision noted that the right-of-way across BLM land consisted of a 2-1/2-mile segment at one end of the project and a 1/2-mile segment at the other end, both of which segments constitute continuations of existing sections of four lane highway. Further, BLM noted that its action in no way authorizes or insures the necessary approval from the Forest Service or the Corps of Engineers for construction of the remainder of the highway through the center of the canyon. The BLM decision asserts that the EA, Design Reports, and related supplemental material represent a "design stage environmental analysis of the effects of different alternative designs on the subject stretch of highway." The decision recited that no significant impact to BLM lands was found in the EA based in part on the application of mitigating measures. The decision further held that the EIS prepared by the CDOH, coupled with the Design Reports, enabled BLM to adequately assess the impact of the project in the EA in compliance with the terms of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4361 (1976). Finally, BLM held that changes in financial circumstances and possible changes in design of the section of the highway not located on public land do not affect the environmental analysis for the highway as it affects public land.

Appellant's statement of reasons for appeal essentially reiterates the grounds stated for the protest. It is contended that BLM erred in making its finding that no significant impact would result from the grant of the right-of-way. Appellant alleges that NEPA requires BLM to consider not only the impact to BLM land, but also the indirect and cumulative effects of the project which the right-of-way makes possible. Further, appellant asserts the EIS is inadequate in that it fails to consider alternate designs for the highway construction, as opposed to alternate locations for the road. Thus, the EIS is alleged to contain insufficient information to allow a reasoned choice of alternatives as far as environmental aspects are concerned. Appellant also alleges that a supplemental EIS is required in light of the significantly changed circumstances affecting the project, including the statutory authorization for waiving interstate highway design standards, the declining traffic volume (demand), and the lack of available funding.

Counsel for BLM allege in answer to appellant's brief that the EA prepared by BLM prior to granting the right-of-way and the documents incorporated therein enable BLM to take a hard look at the problem, that the EA identifies relevant environmental concerns, and that it makes a convincing case that the environmental impact is insignificant. Counsel contend that the scope of the EA is proper since grant of the right-of-way does not involve a choice of alternative route locations (the Glenwood Canyon route having been selected after the 1972 EIS was prepared) and because the grant neither mandates nor authorizes construction of the highway over lands other than the public land administered by BLM. They point out that the segments of four-lane highway across BLM land connect to previously constructed four-lane segments at either end of the project and that the four-lane design would be extended across BLM land regardless of what other alternative might be implemented for the remainder of the project in the canyon.

The right-of-way (C-29107) was issued to CDOH by BLM decision of March 20, 1981, pursuant to the Act of August 27, 1958, 23 U.S.C. §§ 107, 317 (1976), governing Federal-aid highways. The decision granting the right-of-way stated that the regulations at 43 CFR Group 2800 are applicable to the grant and further provided that the "decision becomes final 30 days after its receipt unless it is appealed pursuant to 43 CFR, Part 4, Subpart E."

Appellant has requested a ruling that the decision appealed from granting the right-of-way is stayed pending resolution of the appeal. In support of the motion appellant cites the regulation at 43 CFR 4.21(a) to the effect that, except as otherwise provided by law or regulation, a decision shall not be effective during the time in which an appeal therefrom may be filed by a person adversely affected and during the pendency of any appeal. Appellant contends that exceptions to this regulation are not applicable and further notes that the BLM decision itself provided that it would be final after 30 days unless an appeal is filed.

Although appellant concedes that the general right-of-way regulations provide that decisions under 43 CFR Part 2800, governing rights-of-way, are effective pending appeal unless the Secretary rules otherwise, 43 CFR 2804.1, it is contended that this is not applicable to this case because rights-of-way for Federal-aid highways are specifically excluded from the coverage of the 43 CFR Part 2800 regulations. 43 CFR 2800.0-7(c). Counsel supports his contention by reference to the comments to the rulemaking which noted that the regulations at Part 2800 are solely concerned with rights-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976). 45 FR 44518 (July 1, 1980). Further, it is expressly provided by regulation that applications for Federal-aid highways shall be made pursuant to 23 U.S.C. §§ 107, 317 (1976), as set out in the regulations at 43 CFR Subpart 2821. 43 CFR 2802.2-1(a).

Counsel for BLM have filed a motion in opposition asserting that the decision appealed from is properly construed as effective pending the appeal or, in the alternative, requesting the Board to issue an order placing the decision in effect immediately pursuant to 43 CFR 4.21(a). It is contended that the regulations at 43 CFR Subpart 2821 are not comprehensive and allow for imposition of necessary terms. 43 CFR 2821.5. Counsel for BLM allege

that one of these terms was placing the decision into effect immediately by subjecting the right-of-way to the regulations in 43 CFR Part 2800 which provide that a decision shall remain effective pending appeal. Counsel aver that appellant's motion should be barred by laches in that appellant understood from the time of the grant that BLM considered the decision to be effective and yet did not raise the issue by motion to the Board until several months later.

Counsel for CDOH and Federal Highway Administration have replied to appellant's motion, asserting that as a result of information provided by BLM to CDOH and the Federal Highway Administration, as well as to appellant, indicating that the decision was in full force and effect, a contract was awarded for a segment of the project to the low bidder and work began on August 28, 1981, with construction on the BLM right-of-way beginning on October 15, 1981. CDOH contends that a halt to construction would cause substantial prejudice as damages would have to be paid to the contractor, and, for this reason, the public interest requires that the decision be immediately put into effect.

Accordingly, this appeal raises three major issues. The threshold question is whether the effect of the decision appealed from is stayed pending resolution of the appeal. The second issue is whether BLM properly limited the scope of its environmental inquiry upon which it based its finding of no significant impact to the effect of the right-of-way upon public domain administered by BLM rather than the cumulative impact of the entire highway project. If the latter question is answered in the affirmative, the issue presented is whether BLM's environmental analysis properly supports a finding of no significant impact to the public domain.

The BLM decision granting right-of-way C-29107 expressly cites as statutory authority therefor 23 U.S.C. §§ 107, 317 (1976). The decision states that the relevant regulations are 43 CFR Group 2800. The decision granting the right-of-way further states that it shall become "final 30 days after its receipt unless it is appealed pursuant to 43 CFR, Part 4, Subpart E."

[1] The general rule is that the effect of decisions regarding applications for the public lands and their resources are stayed during the period in which such decisions may be appealed by an adversely affected party and until such time as a decision is reached resolving any properly filed appeal. 43 CFR 4.21(a). One reason for this rule is to provide at least one level of administrative review of such decisions within the Department before they become subject to judicial review and, accordingly, the regulation provides that no decision which is subject to appeal shall be deemed final administrative action (constituting exhaustion of administrative remedies) for purposes of judicial review unless such decision has been made effective pending a decision on appeal. 43 CFR 4.21(b). Exceptions to the general rule are recognized where statute or regulations provide that initial decisions are effective immediately, regardless of the filing of an appeal. Such an exception with respect to FLPMA rights-of-way is mandated by 43 CFR 2804.1(b). However, this is not the relevant regulation in this case.

The scope of the regulations at 43 CFR Part 2800, governing rights-of-way issued pursuant to Title V of FLPMA, is specifically defined to exclude

right-of-ways for Federal-aid highways. 43 CFR 2800.0-7(c.) This is consistent with the explanatory comments of the drafters of the regulations. The regulation at 43 CFR 2802.2-1(a) expressly provides that applications for Federal-aid highways pursuant to 23 U.S.C. §§ 107, 317 (1976), shall be made pursuant to 43 CFR Subpart 2821. The regulations at 43 CFR Subpart 2821 contain no provision making decisions with respect to such rights-of-way effective immediately pending appeal. Thus, pursuant to the regulations it must be concluded that the effect of the decision granting right-of-way C-29107 is stayed pending resolution of this appeal. 43 CFR 4.21(a).

This determination would ordinarily require consideration of the motion by counsel for BLM to place the decision into effect pending resolution of the appeal on the ground that this is required in the public interest and justified on the basis of laches. However, in the interest of expediting final consideration of this matter, we find it appropriate to review the case on the merits and conclude the matter administratively.

The next issue is whether BLM improperly limited its environmental assessment to the impact of the right-of-way grant upon the public domain lands which it crossed rather than considering the cumulative impact of the entire highway project through the canyon when determining if an environmental impact statement was required. Section 102 of NEPA, 42 U.S.C. § 4332 (1976), requires preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." Thus, two elements are required: significant environmental impact and Federal agency action which is major in scope. N.A.A.C.P. v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978). Factors identified as relevant in determining whether veto control over a project requires a projectwide environmental analysis include the degree of discretion exercised by the agency over the Federal portion of the project, the degree of Federal aid or support for the project, and whether overall Federal involvement with the project is sufficient to turn essentially private action into public action. Winnebago v. Ray, 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836 (1980). Although there is little question of the degree of Federal involvement in this project, the discretion of BLM in this matter was limited to influence over the design of the highway segments crossing the public domain.

[2] The proper scope of a proposed highway project for purposes of environmental analysis pursuant to section 102 of NEPA, 42 U.S.C. § 4332 (1976), may be determined by applying three standards: Whether the proposed segment has a substantial utility independent of future expansion, whether construction would foreclose significant alternative routes or locations for an extension from the segment, and, where a proposed segment is part of a larger plan, whether the plan has become concrete enough to make it highly probable that the entire plan will be carried out in the near future. Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir. 1976). The test of whether the environmental analysis with respect to a highway project has been improperly segmented has been recently stated as whether the highway segment analyzed has logical termini, whether the segment has substantial independent utility, whether construction of the segment forecloses the opportunity to consider alternatives, and whether construction of the segment irretrievably commits Federal funds for closely related projects. Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981).

Applying these standards, we find that the segments of the interstate highway authorized by the BLM right-of-way, lying at both ends of the canyon and linking with already constructed segments of interstate highway as they do, have substantial independent utility regardless of whether the remainder of the project through the canyon is constructed. The segments authorized by the BLM right-of-way have logical termini, linking with already constructed sections of interstate highway at one end and with the existing two-lane highway through the canyon (over which traffic must travel if the balance of the project is not constructed) at the other end. Further, construction of the highway segments across BLM land does not foreclose alternative routes or locations for other portions of the planned highway connecting therewith as the location of the highway was only determined after completion of the earlier EIS and could not reasonably be expected to be altered at this time. Finally, grant of the right-of-way authorizing construction across BLM land does not constitute a commitment of Federal funds for construction of the balance of the project through the center of the canyon. Therefore, we must reject appellant's contention that BLM improperly segmented the project and curtailed the scope of environmental analysis in limiting its examination to the impacts upon public land.

[3] Finally, the question presented is whether the environmental analysis of BLM supports the finding of no significant impact on the public land. The reasonableness of a finding of no significant impact has been upheld where the agency has taken a hard look at the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized it. Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd on other grounds, 609 F.2d 342 (8th Cir. 1979), cert denied, 446 U.S. 936 (1980).

The EA of BLM upon which the finding of no significant impact was based incorporated by reference certain documents prepared in connection with the highway project including the Draft Design Report, Vols. 1 and 2 (Oct. 1978); the Glenwood Canyon Fine Tuning Report, including the Book Cliffs insert, dated September 17, 1980; the Final Environmental Impact Statement (revised July 1972); the Interim Hydraulic Report for the Colorado River Through Glenwood Canyon prepared by Lawrence E. Dezman (December 1979); and cultural resources reports regarding historic and archaeological resources. The description of the proposed action reflects consideration of various alternative designs for the highway construction across BLM land and their impact on canyon panoramas and recreational opportunities. Reasons are given for rejection of those alternative designs not selected. Physical impacts including rock cuts, river encroachment through filling, removal of vegetation, and repair of existing talus scars are analyzed in the Draft Design Report. Mitigation measures are also discussed. The analysis in the Glenwood Canyon Fine Tuning Report reflects further evaluation of the impact of grading, terracing, and rock cuts involved in construction and appropriate design modifications to mitigate their impact. The environmental analysis also evaluates the impact on various types of recreational activities including hiking, biking, fishing, boating, and picnicking. Impacts of the fill requirements for highway construction on river level and rate of flow are analyzed in the Interim Hydraulic Report. The impact of construction on cultural resources of historic significance is also set forth in the file.

Where an administrative decision is made that a proposed action is not a major Federal action that will significantly affect the quality of the human environment, so that no EIS need be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such record. Sierra Club, 57 IBLA 79 (1981); Citizens' Committee to Save Our Public Lands, 29 IBLA 48, aff'd, Citizens' Committee to Save Our Public Lands v. Andrus, Civ. No. C77-6335C (N.D. Cal. May 19, 1977). Upon review of the record, we are convinced that relevant areas of environmental concern have been identified and that BLM officials have taken a hard look at the environmental problems. The record supports a finding by BLM that construction of the highway pursuant to the right-of-way, with the mitigation factors identified in the record, will have no significant impact on the public land administered by BLM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

